CARE REQUIRED FOR SAFETY OF PASSENGERS FROM ARTICLES FALLING FROM BAGGAGE RACKS.

In the construction and maintenance of their roadbed and in the selection, equipment and management of their passenger trains, railroads are required to exercise the highest degree of practical care for the safety of passengers This duty is universally recognized and enforced. Does it extend to the avoidance of those dangers arising from the presence of articles of baggage or other objects brought in the car by passengers and placed in racks or receptacles provided for that purpose by the company?

In Simon *v.* Richmond, Fredericksburg & Potomac Railroad Company (tried June 1, 1916, in Hustings Court Part II of Richmond, Va.), the writer defended a claim for personal injuries received by the plaintiff from the fall of a handbag placed in a baggage rack by another passenger. Plaintiff did not see the bag before it fell, but a fellow-passenger testified that it had been "pushed in" the rack on top of an overcoat and projected diagonally out over the edge several inches. Brakemen had standing orders from the conductor to go through the train after its departure from the station where the plaintiff got on, to see that all baggage placed in the racks by passengers was secure. This the brakeman testified he did, both he and the conductor having passed through the coach in question after plaintiff came aboard, but neither observed anything unusual either in the size or position of the articles in the rack. It affirmatively appeared that there was no unusual motion in the movement of the train and that the coach was all-steel construction, equipped with standard size baggage racks. Upon these facts, the following instruction as to its duty to the plaintiff with reference to the avoidance of dangers likely to arise from the fall of objects so situated, was asked for by the defendant and given by the court.

> "The court instructs the jury that though they may believe from the evidence that the plaintiff was a passenger for hire upon the defendant company's train, the defendant company was not an insurer of his safety from injuries received from the falling of the hand-bag in question and therefore the said defendant is not bound to satisfactorily account

for the cause of its falling; and if the jury believe from the evidence that the defendant company exercised the highest degree of practical care in the provision of a passenger coach and suitable baggage racks therein, the defendant's agents, servants and employees were thereafter only required to exercise ordinary care in ascertaining whether the hand-bag in question, by reason of its size or position in the rack, was likely to fall upon the plaintiff; and if the jury believe from the evidence that the agents, servants and employees of the defendant company neither knew, nor by the exercise of ordinary care should have known from the size of the hand-bag or its position in the rack that it was likely to fall upon the plaintiff, then the defendant is not responsible for the accident in which the plaintiff received the injuries complained of and the jury should find for the defendant."

The differentiation pointed out between the degree of care required of the railway with reference to the discharge of its previsionary duties and its obligation to observe and avoid dangers arising from agencies over which it is not in absolute control, is well founded both in reason and authority, though the number of the latter are comparatively few.

In Morris *v.* New York Central & Hudson River Railroad Company, 106 N. Y. 678 (the first and leading case upon this question), the plaintiff was injured while a passenger upon the defendant's train in consequence of the falling upon him of a clothes wringer placed in the baggage rack over his head by another passenger. In reversing the action of the lower court with reference to the degree of care required of the railway to avoid injuries so received, the court said:

"In looking out for dangers arising from causes such as this, we do not think that carriers of passengers are to be held to the exercise of the highest care which human vigilance can give. That measure of care has been spoken of as due from them in the actual transportation of the passenger, and, in regard to the results naturally to be apprehended from a failure to furnish safe roadbeds, proper machinery, perfect cars or coaches, and things of that nature. But, in regard to a danger of this kind, a carrier of passengers is, we think, held to a less strict measure of vigilance. Reasonable care (to be measured by the circumstances surrounding each case) to prevent accidents of this nature is

> that is demanded, and we do not think there was evidence in this case of any such lack of care on the part of the officers of the train."

In Whiting *v.* New York Central & Hudson River Railroad Company, 97 Ap. Div. 11, the Appellate Division of the Supreme Court of New York followed the Morris decision, supra, in a case in which the plaintiff was injured by the fall of a satchel placed in the rack above her and in her presence by a traveling companion. The language of the opinion in the Morris case, supra, will be found quoted in the opinion of the instant case.

In Adams *v.* Louisville & Nashville Railroad Company, 134 Ky. 620, 121 S. W. 419, 135 Am. St. Rep. 425, the plaintiff, clothed in a heavy veil, was directed to a seat by defendant's brakeman and, after riding about 12 miles, was injured by the fall of a suit case which had been placed in the rack overhead before she got upon the train. While reversing the action of the lower court in peremptorily instructing for the defendant, for the reason that upon all the facts it could not be said as a matter of law that the railway company had not been negligent, the Supreme Court pointed out the degree of care required in such cases and stated that whether the defendant had discharged the same was a question of fact for the jury. The court said:

> "In matters of this sort the trainmen are only required to exercise such care as may be reasonably expected of persons of ordinary prudence under the circumstances, and as to what should be expected of a person of ordinary prudence a jury of twelve men, coming from the different walks of life, and putting together their common experiences, are peculiarly qualified to judge."

In Louisville & Interurban R. R. Co. *v.* Rommele, 152 Ky. 719, 154 S. W. 16, the plaintiff was injured by the fall of a leather crupper for a horse, carried in a sack and placed by another passenger over the seat occupied by the plaintiff. In affirming in substance the rule pronounced in the previous Kentucky case with reference to the degree of care required of the railway company to avoid injuries so received, the court at page 721 said:

"If the servants in charge of the car, or whose duty it is to look after the safety and comfort of passengers, see or have opportunity in the performance of their duties to see a package or bundle in a rack, and it is of such size or appearance, or is so placed in the rack that a prudent person in the exercise of ordinary care might reasonably anticipate that the movement of the car would cause it to fall out, it is the duty of the servants named to remove it from the rack or secure it in some way, and if they fail to do this, and a passenger is injured by the package falling from the rack, the carrier will be liable. But if a package or bundle placed in a rack is of a size and appearance suitable to be placed in the rack, and there is nothing in the manner in which it is placed in the rack to cause a prudent person exercising ordinary care to anticipate that it might fall out, the carrier will not be liable."

The foregoing are all of the cases* that have been found in which the question under consideration has been directly dealt with, except Rosenthal *v* New York, New Haven & Hartford Railroad Company, 88 Conn. 65, in which the Connecticut court takes a contrary view upon a somewhat different state of facts in that there was evidence of negligent operation of the train which might have caused the fall of the suit case resulting in the plaintiff's injuries. The court said:

"It is said that the doctrine of res ipsa loquitur has no application to this case because the suit-case which caused the injury was not under the control of the defendant But we are not inclined to follow the suggestion, contained in some of the New York cases, that the railroad company is bound to exercise only a reasonable degree of care in protecting its passengers from the risk of luggage falling from racks provided for its stowage. The furnishing of racks for that purpose invites passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath such racks."

Upon the facts involved, the court no doubt reached a correct conclusion in this case, but its confusion of thought with refer-

*For text authorities, see Hutchinson on Carriers, Sec. 920, and Moore on Carriers (2d Ed.) Vol. II. p. 1206.

ence to the respective duties owing the passenger by the railway company to exercise the highest degree of practical care in the actual management of the train as distinguished from only ordinary care to observe and avoid dangers likely to arise from articles brought into the car by passengers, does not inspire confidence in the correctness of its conclusion upon the question under consideration. The court's reference to the doctrine of res ipsa loquitur is suggestive, however, for the reason that a true understanding of the application of that principle more readily demonstrates the correctness of the view pronounced in the weight of authority. This principle applies when the facts indicate that the plaintiff's injury has resulted from some cause under the control of the defendant and as to which, in view of the circumstances, a presumption arises that it has failed in the discharge of its provisional duty. As stated in Peters *v.* Lynchburg Traction Company, 108 Va. 333, "The doctrine rests upon the assumption that the thing which causes the injury is under the exclusive management of the defendant, and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. Ross *v.* Double Shoals Cotton Mill, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; Wigmore on Evidence, Sec. 2509; 1 Sherman & Redfield on Negligence, Sec. 59."

Unless the essential elements adverted to in the opinion of the Virginia court are shown to exist, the doctrine of res ipsa loquitur can have no correct application to a particular case. As stated in Norfolk & Western Railway Co. *v.* Ferguson, 79 Va. 241:

> "The presumption of negligence, however, does not attach itself to every injury which may overtake a passenger while being transported in a car; it belongs only to that class of accidents where the injury is caused by a defect in the road, cars or machinery, or by want of diligence or care in those employed, or by some other thing which the company can and ought to control as a part of its duty to carry the passenger safely, because in all these matters it is the duty of the company to use the highest degree of care to have all their arrangements safe and in good condition. 20 Amer. Railway Decisions, 245-7 and 261; Meier *v.* Penn. Rail-

road Company, 64 Penn. St. 225; Curtis *v.* Rochester & Syracuse R. R. Co., 18 New York, 534; American Law Review, January number, 1871."

It will thus be seen that as to those matters with reference to which the carrier is required to exercise the highest degree of practical care a presumption of negligence arises when the surrounding circumstances afford reasonable ground for the inference that the injury was caused by the defendant's failure to perform the same. When, however, the facts show that the cause of the injury was not exclusively under the carrier's control and that knowledge thereof was as accessible to the plaintiff as to the defendant, the reason for the rule requiring the highest degree of practical care fails and with it the rule itself.

The principle under consideration finds apt illustration in the nature of the duty resting upon the carrier to avoid injuries from fellow-passengers. The law in this respect is well settled that in order to make the carrier liable, the injury received must have been of such a character and perpetrated under such circumstances that it must reasonably have been anticipated and naturally expected to occur. Here the source of possible danger is also beyond the exclusive control of the carrier and knowledge thereof is ordinarily as accessible to the person injured as to the defendant's employees. Reasonable prudence and not the highest degree of practical care is all that is required of the carrier under such circumstances and the reason for the difference in the degree of care required is the same as that upon which a distinction is drawn in cases involving injury received from articles brought into the car by other passengers and over which the carrier is not able to exercise exclusive control.

In reason, therefore, the principle pronounced in the weight of authority seems well founded and it can be stated with practical certainty that the duty owing the passenger by the carrier under such circumstances is one of ordinary care only.

THOMAS B. GAY, In *The Memorandum.*